IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Kruger v. PortLiving Properties Inc.,*
2024 BCSC 1046

Date: 20240621
Docket: S232688
Registry: Vancouver

Between:

Roland Friedrich Kruger and Hagen Kruger

Plaintiffs

And

PortLiving Properties Inc. and PortLiving Farms Limited Partnership

Defendants

Before: The Honourable Justice J. Hughes

Reasons for Judgment

Counsel for the Plaintiffs:	T.C. Louman-Gardiner D.S. Boeré
Counsel for the Defendants:	M.D. Noguera Aviles
Place and Date of Hearing:	Vancouver, B.C. June 3, 2024
Place and Date of Judgment:	Vancouver, B.C. June 21, 2024

Overview

[1] This summary trial application is brought in respect of a contractual debt claim that arises out of the purchase of Wild Goose Winery by the defendant, PortLiving Farms Limited Partnership ("PortLiving Farms"), from the plaintiffs, Roland and Hagen Kruger, pursuant to a share purchase agreement dated August 2, 2019 (the "SPA").

[2] The purchase price was to be paid over time, after closing, in tranches and through different forms of consideration. The purchase price was not paid as contemplated by the SPA, which has given rise to a multitude of proceedings in this Court, including this action, in which the plaintiffs advance a claim for the last component of the purchase price.

[3] The plaintiffs seek judgment against the defendants jointly and severally in the amount of $1 million, together with pre-judgment interest and costs. The basis for the judgment sought is a "put right" clause contained in the SPA which provided the plaintiffs with an option to have one million partnership units in PortLiving Farms that were issued to them pursuant to the SPA, repurchased by PortLiving Farms at a price of one dollar per share (the "Put Right"). The defendant, PortLiving Properties Inc. ("PortLiving Properties"), provided an absolute and unconditional guarantee of PortLiving Farms' obligations under the Put Right (the "Guarantee").

[4] The defendants no longer own the winery. It was sold to a third party in receivership proceedings brought by the plaintiffs in respect of non-payment of another component of the purchase price.

[5] The primary issue for determination on this summary trial application is whether the defendants have defaulted on their obligations under the Put Right and the Guarantee such that the plaintiffs are entitled to judgment against them. In defence of the plaintiffs' claim, the defendants assert that the plaintiffs failed to comply with their obligations under implied terms of the SPA and Guarantee, which constituted a fundamental breach of those agreements, thereby relieving the defendants of performance of their remaining obligations thereunder. Consequently,

I must also determine whether the terms alleged by the defendants form part of the SPA and Guarantee by implication, and if so, whether they were breached by the plaintiffs so as to bring those agreements, and the defendants' obligations thereunder, to an end.

Background

[6] The facts regarding the purchase and sale of the winery are not in dispute. Given the plaintiffs' common surname, I will refer to them by their first names. I intend no disrespect in doing so.

[7] Roland and Hagen Kruger are brothers who owned and operated Wild Goose Winery through Wild Goose Vintners Inc. ("Wild Goose"). Roland and Hagen held their respective ownership interests in Wild Goose through trusts, namely the Hagen Kruger Family and the Roland Kruger Family Trust. Roland and Hagen are parties to the various agreements regarding the sale of Wild Goose.

Share Purchase Agreement

[8] On August 2, 2019, Roland, Hagen, and their trusts entered into the SPA with PortLiving Farms and PortLiving Farms Wineries Limited Partnership ("PortLiving Wineries"). Pursuant to clause 5.4 of the SPA, the total purchase price was $12.25 million, to be paid by way of: a cash payment of approximately $9 million; a vendor take-back promissory note in the principal sum of $2.25 million (the "VTB Note"); and one million partnership units in PortLiving Farms, valued at one dollar each (the "Partnership Units").

[9] On September 20, 2019, PortLiving Wineries granted the VTB Note in favour of Roland and Hagen. Pursuant to the VTB Note, PortLiving Wineries agreed to pay the principal sum of $2.25 million in tranches of $562,500 every six months after closing, together with interest at 5% per annum.

[10] The Put Right was set out in clause 5.5 of the SPA, and permitted the plaintiffs to demand that PortLiving Farms repurchase the Partnership Units for $1

million on or after September 21, 2022. The Put Right provided in material part as follows:

> 5.5 **Partnership Units**. From and after the third anniversary of the Closing Date, [the plaintiffs] shall have the right to, upon written notice to the [PortLiving Wineries] and [PortLiving Farms], sell all and not less than all of the Partnership Units to the [PortLiving Farms] for a price per Partnership Unit equal to their original value of allotment and issuance, being $1 for each Partnership Unit and $1 million for the Partnership Units (the "**Put Right**"), provided that [PortLiving Farms] shall have 180 days upon receipt of such written notice to pay to [Hagen and Roland] the amount for such Partnership Units redeemed pursuant to the Put Right. The Put Right will be guaranteed by PortLiving Properties Inc. …

[11] The SPA also contained an "entire agreement clause", as follows:

> 9.7 **Whole Agreement.** This Agreement together with the other documents contemplated hereby contain the whole agreement between the parties in respect of the purchase and sale of the Shares and there are no warranties, representations, terms, conditions or collateral agreements, express or implied, or otherwise other than expressly set forth in this Agreement.

[12] On September 20, 2019, PortLiving Properties provided the Guarantee, which was an absolute and unconditional guarantee of PortLiving Farms' obligations under the Put Right provision of the SPA, and was payable on demand:

> **NOW THEREFORE IN CONSIDERATION** of the sum of $10.00 and other good and valuable consideration now paid by [the plaintiffs] to [PortLiving Properties], the receipt and sufficiency of which is hereby acknowledged by [PortLiving Properties], [PortLiving Properties] hereby absolutely and unconditionally guarantees the due payment, observance and performance of all of [PortLiving Farms'] obligations to pay the $1 million payable to [Hagen and Roland] pursuant to the Put Right pursuant to Section 5.5 of the Share Purchase Agreement. Upon [PortLiving Farms'] failure to fulfill any of its obligations related to the Put Right, [PortLiving Properties] promises, upon demand, to pay, observe and perform such of [PortLiving Farms'] obligations thereunder.

[13] The Guarantee also contained an entire agreement clause providing that there were no "representations, agreements, warranties, conditions, covenants or terms, express or implied, collateral or otherwise, affecting this Guarantee or the Guarantor's obligations and liabilities hereunder other than as expressed herein or in Section 5.5 of the Share Purchase Agreement".

[14] As contemplated in clause 6.1 of the SPA, the plaintiffs entered into employment and consulting agreements with Wild Goose (collectively, the "Employment Agreements"). Among other terms, the Employment Agreements included non-competition and non-solicitation provisions, and required the plaintiffs to act "in good faith and in the best interests of [Wild Goose]" in performing their duties thereunder. The Employment Agreements also contained entire agreement clauses that were substantively similar, and which, in Roland's case, provided as follows:

> 8.2 This Agreement, the SPA and documents and agreements contemplated in the SPA constitute the entire agreement between the Parties with respect to the subject matter hereof and cancels and supersedes any previous oral or written communications, representations, understandings or agreements between the Parties with respect thereof. There are no representations, warranties, terms, conditions, undertakings or collateral agreements, express or implied, between the Parties other than as expressly set froth in this Agreement, the SPA and documents and agreements contemplated by the SPA.

[15] The purchase price payable under the SPA, with the exception of realization on the Partnership Units, was to have been paid in full by September 2021.

Default on the Promissory Note and the Forbearance Agreement

[16] PortLiving Wineries did not make the first payment under the VTB Note when due in late March 2020. The plaintiffs gave notice that the full amount due under the VTB Note would become immediately payable if the default was not cured by April 23, 2020.

[17] PortLiving Wineries did not cure the default under the VTB Note. In light of this, and given a further alleged default of amounts owing pursuant to a working capital adjustment contemplated in the SPA, the plaintiffs proposed a form of forbearance agreement and indicated that if it was not agreed to, they would proceed with litigation. The parties did not reach an agreement and on May 15, 2020, the plaintiffs filed a notice of civil claim seeking, *inter alia*, judgment on the VTB Note.

[18] Further negotiations followed, which resulted in the plaintiffs, the defendants, PortLiving Wineries, Wild Goose, and three other PortLiving corporate entities (the "Parkview Guarantors") entering into a forbearance agreement dated July 31, 2020 (the "Forbearance Agreement"). The Forbearance Agreement provided an extension of time and revised payment schedule for the amounts owning under the VTB Note. In exchange, the plaintiffs received, among other consideration, a mortgage and general security agreement ("GSA") from Wild Goose, and mortgages over real property owned by Wild Goose and the Parkview Guarantors.

[19] As contemplated in the Forbearance Agreement, Wild Goose executed a GSA and a guarantee, both of which were new obligations of Wild Goose. The Forbearance Agreement also provided that in the event of a default, the plaintiffs were required to first realize on Wild Goose's assets by way of the GSA before seeking to collect from, or execute on the mortgages provided by, the Parkview Guarantors. In this respect, the Forbearance Agreement provided in material part that:

> 6.15 [PortLiving Farms, PortLiving Wineries, Wild Goose, the Parkview Guarantors and PortLiving Properties] agree that, in the even of an Event of Default (as defined herein) or the termination of this Forbearance Agreement, [the plaintiffs] shall be immediately entitled to take any steps to realize on the Personal Property Security, the Guarantee, or the Indebtedness as they consider appropriate limited only as set out in paragraph 6.16 below.
>
> 6.16 Apart from commencing a proceeding for the sole purpose of commencing a proceeding prior to the expiry of the applicable limitation period, [the plaintiffs] shall not take any steps to collect the Indebtedness from the Parkview Guarantors or realize against their assets until [the plaintiffs] have:
>
> > (a) Made commercially reasonable efforts to realize on the asset of Wild Goose, either as against the assets of Wild Goose or the shares or Wild Goose owned by [PortLiving Farms and PortLiving Wineries], in the sole discretion of [the plaintiffs] acting reasonably; and
> >
> > (b) Made commercially reasonable efforts to realize on the assets of [PortLiving Properties], provided that:
>
> …
>
> 6.18 If [the plaintiffs] takes [sic] any enforcement steps in respect of the Security, the Obligations, or the Indebtedness, [PortLiving Farms, PortLiving Wineries, Wild Goose, the Parkview Guarantors and PortLiving Properties] covenant and agree to waive all defences.

[20] The Forbearance Agreement also provided that in the event of a default thereunder, the plaintiffs were entitled to seek immediate appointment of a receiver and the defendants would consent to it:

> 9.2 Upon the occurrence of an Event of Default under this Forbearance Agreement, [the plaintiffs], having already demanded repayment of the Indebtedness from [PortLiving Farms and PortLiving Wineries], may at their own option, provided the Cure Period has expired and subject to paragraph 6.16 above:
>
> (a) submit the Consent Judgment for entry;
>
> (b) immediately terminate this Forbearance Agreement;
>
> (c) immediately take such steps as it deems necessary or advisable to realize on the Security, or any other security it may hold, or the Guarantees;
>
> (d) immediately appoint a receiver or receiver-manager, and [PortLiving Farms, PortLiving Wineries, Wild Goose, the Parkview Guarantors and PortLiving Properties] hereby consent to such appointment of a receiver or receiver-manager by instrument and to any application initiated by [the plaintiffs] to have a court appointed receiver or receiver-manager; and/or
>
> (e) pursue such other remedies as they deem appropriate.
>
> [Emphasis added].

[21] The Forbearance Agreement also contained an entire agreement clause, which provided that it contained "the entire agreement amongst the parties relating to the matters contemplated hereby" and that there were "no representations, warranties, covenants or agreements relating thereto other than as set out herein".

Appointment of Receiver and Sale of Winery

[22] In October 2020, PortLiving Wineries and PortLiving Properties failed to pay an installment due under the Forbearance Agreement, defaulting on their obligations thereunder. That default was not cured. Accordingly, and as provided for in clause 9.2 of the Forbearance Agreement, the plaintiffs applied to have a receiver appointed over the assets and undertakings of Wild Goose.

[23] Consistent with the covenants they granted in the Forbearance Agreement, the defendants did not oppose the appointment of a receiver. On March 25, 2021,

this Court appointed Bowra Group Inc. as receiver (the "Receiver" or the "Receivership").

[24] The Receiver sold Wild Goose's assets pursuant to a further order of this Court made on July 8, 2021. Justice Gomery's reasons for judgment approving the sale are indexed as *Kruger v. Wild Goose Vintners Inc*., 2021 BCSC 1406, leave to appeal to BCCA ref'd (28 July 2021), Vancouver CA47618.

Exercise of Put Right

[25] On September 21, 2022, the plaintiffs gave notice that they were exercising the Put Right, completion of which was to take place within 180 days—or by March 20, 2023—pursuant to clause 5.5 of the SPA. The plaintiffs also contemporaneously gave notice to PortLiving Properties and Macario Reyes, a director and shareholder of the defendants, that they were exercising the Put Right, and reminding PortLiving Properties of its obligations under the Guarantee. They also requested assurances that PortLiving Farms would honor the Put Right and that PortLiving Properties had sufficient assets to satisfy its obligations under the Guarantee.

[26] On March 21, 2023, the plaintiffs gave notice to PortLiving Properties that PortLiving Farms had failed to repurchase the Partnership Units pursuant to the Put Right and that they were therefore demanding immediate payment of $1 million from PortLiving Properties pursuant to the Guarantee.

[27] PortLiving Farms and PortLiving Properties have not paid the $1 million to the plaintiffs to repurchase the Partnership Units.

Preliminary Pleadings Issue

[28] The plaintiffs' claim sounds in debt for $1 million which they allege is owed to them pursuant to their exercise of the Put Right. In their response to civil claim, the defendants plead the existence of an implied oral "umbrella agreement" (the "Implied Umbrella Agreement"), the material terms of which were:

a) the plaintiffs would not take steps to prevent PortLiving Farms from being able to satisfy its obligations to the plaintiffs pursuant to the SPA;

b) the plaintiffs would not take steps to cause Wild Goose and/or Wild Goose Vineyards to cease operating; and

c) the plaintiffs would not take steps to devalue the Partnership Units.

(the "Best Efforts Terms").

[29] The defendants then plead that the plaintiffs' conduct in having the Receiver appointed constituted a breach of the alleged Implied Umbrella Agreement.

[30] The defendants' position changed their application response to this summary trial application. In addition to asserting the Implied Umbrella Agreement, the defendants also alleged that:

a) the Best Efforts Terms ought to be implied into the SPA and the Guarantee;

b) the plaintiffs' conduct in refusing to agree to a proposed sale of the winery to a third party and having the Receiver appointed constituted a breach of the Best Efforts Terms; and

c) in the alternative, the appointment of the Receiver frustrated the defendants' ability to perform their obligations under the SPA and the Guarantee.

[31] The defendants' position changed again in oral argument. They abandoned their pleaded defence predicated on the Implied Umbrella Agreement. In addition, the defendants abandoned their position that the SPA was frustrated by the appointment of the Receiver and that the plaintiffs' conduct in refusing to agree to a proposed sale of the winery somehow constituted a breach of the plaintiffs' obligations.

[32] As such, the defendants' response on this application and defence of the plaintiffs' claim was limited to the position set out in para. 6 of the application response, namely:

> 6. If the ability to sell back the Partnership Units is given to the parties in a purchase agreement, it goes without saying that the parties impliedly agreed that they would not take actions to lower the value of the Partnership Units or prevent [Wild Goose Vintners Inc.] from continuing to do business. The Plaintiffs were not permitted to place [Wild Goose Vineyards] in receivership. The Plaintiffs were to act in the best interest of the [Wild Goose Vintners Inc.] and not prevent the Defendants from fulfilling their obligations to the Plaintiffs. The Defendants state that the following terms should be implied into the [SPA] and the Guarantee, as being clearly intended by the parties and necessary to give business efficacy to the contract:
>
> a. the Plaintiffs would not take steps to prevent [PortLiving Farms Limited Partnership] from being able to satisfy its obligations to the Plaintiffs pursuant to the [SPA];
>
> b. the Plaintiffs would not take steps to cause [Wild Goose Vintners Inc.] and/or the Business to cease operating;
>
> c. the Plaintiff would not take steps to devalue the Partnership Units.

[33] The position that the Best Efforts Terms are implied terms of the SPA and Guarantee is not pleaded in the response to civil claim. The defendants acknowledged that by virtue of abandoning the defence pleaded in their response to civil claim, they were left with essentially no defence to the claim or summary trial application. The defendants sought to leave to have their application response "converted" to a response to civil claim for purpose of this summary trial application, but adduced no authority for proceeding in such a manner.

[34] The plaintiffs did not want to delay the determination of this application on account of the defendants' change of position, and indicated they were prepared to respond to the defendants' assertion that the Best Efforts Terms should be implied into the SPA and Guarantee. The plaintiffs thus consented to their summary trial application proceeding on the basis of the defence set out in para. 6 of the application response, as reproduced above, despite the defendants' failure to properly plead it.

Is This Matter Suitable for Determination by Way of Summary Trial?

[35] The plaintiffs assert that this matter is suitable for determination by summary trial. The defendants do not say otherwise. Having regard to the factors set out in *Gichuru v. Pallai*, 2013 BCCA 60 at para. 30 and more recently reiterated in *Arbutus Investment Management Ltd. v Russell*, 2022 BCSC 72 at para. 42, aff'd 2023 BCCA 9, I find that this matter is suitable for summary trial.

[36] The central issue is discrete and there is little, if any, contested evidence on the material facts. There is no dispute regarding the interpretation of the Put Right, that the plaintiffs exercised the Put Right, nor that PortLiving Farms failed to pay $1 million to the plaintiffs to repurchase the Partnership Units. The contested issues are whether the Best Efforts Terms ought to be implied into the SPA and the Guarantee, and, if so, whether the plaintiffs' conduct in bringing an application to appoint the Receiver was in breach of those implied terms.

[37] Determination of these issues involves an application of well-settled principles of contract law to a largely uncontested body of evidence. I am satisfied that I can find the facts necessary to resolve these issues on the evidentiary record before me and that it would not be unjust to do so. While the amount involved is significant, it is nonetheless a relatively small portion of the overall purchase price under the SPA. Regardless, the fact that a claim is large is not fatal to its suitability for summary trial: *Gichuru,* at paras 30-31.

Have the Defendants Breached the SPA and the Guarantee?

[38] The circumstances surrounding the execution of the SPA and the Guarantee and the facts pertaining to the plaintiffs' exercise of the Put Right and demand on the Guarantee are not disputed. Nor do the defendants take issue with the interpretation of the Put Right or the Guarantee, or assert that they are unenforceable.

[39] The uncontradicted evidence before me establishes that:

a) the plaintiffs exercised the Put Right on September 21, 2022, demanding that PortLiving Farms repurchase the Partnership Units at the contract price of $1 million;

b) pursuant to the Put Right, PortLiving Farms was required to repurchase the Partnership Units from the plaintiffs within 180 days, namely by March 20, 2023;

c) PortLiving Farms did not repurchase the Partnership Units as required by the Put Right;

d) on March 21, 2023, the plaintiffs demanded immediate payment of the $1 million purchase price for the Partnership Units from PortLiving Properties pursuant to the Guarantee; and

e) PortLiving Properties has not paid the plaintiffs the $1 million under the Guarantee.

[40] I am thus satisfied that the plaintiffs have proven on a balance of probabilities that PortLiving Farms failed to comply with its obligations under Put Right contained in clause 5.5 of the SPA and PortLiving Properties has failed to comply with its obligations under the Guarantee. Neither defendant has paid the $1 million owing to the plaintiffs to repurchase the Partnership Units pursuant to the Put Right.

[41] As noted above, the defendants' defence turns on whether they were relieved of their obligations under the SPA and the Guarantee because the plaintiffs' conduct in having the Receiver appointed constituted a fundamental breach of the Best Efforts Terms. In order to succeed in this respect, the defendants must first establish that the Best Efforts Terms are implied terms for each of the SPA and the Guarantee. If they are successful in both respects, the defendants then say that they accepted the plaintiffs' repudiation of the SPA and Guarantee, thereby bringing those agreements to an end and relieving the defendants of their respective obligations to pay the plaintiffs $1 million to repurchase the Partnership Units.

[42] For the reasons set out below, I find that the defendants' position fails at the first stage of the analysis. They have not established that the Best Efforts Terms form part of the SPA or the Guarantee by implication.

(a) The Best Efforts Terms Are Not Implied Terms of the SPA or Guarantee

[43] There are three means by which a term can be implied into a contract: based on custom or usage, as the legal incidents of a particular class or kind of contract, or based on the presumed intentions of the parties where the implied term must be necessary "to give business efficacy to a contract or as otherwise meeting the 'officious bystander' test as a which the parties would say, if questioned, that they had obviously assumed": *M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd.*, [1999] 1 S.C.R. 619 at para. 27, 1999 CanLII 677 [*M.J.B. Enterprises*]. The defendants rely on the third ground, asserting that the Best Efforts Terms are necessary to give the SPA and the Guarantee business efficacy.

[44] The onus is on the party seeking to establish an implied term of a contract: *Athwal v. Black Top Cabs Ltd*., 2012 BCCA 107 at para. 48. The device of implying terms into a contract is to be used sparingly and with caution: *Kaban Resources Inc. v. Goldcorp Inc.*, 2020 BCSC 1307 at para. 85, aff'd 2021 BCCA 427, leave to appeal to SCC ref'd 39940 (28 April 2022) [*Kaban*], citing *High Tower Homes Corp. v. Stevens*, 2014 ONCA 911 at para. 39. An implied term cannot be inconsistent with the express terms of a written agreement: *Kaban* at para. 80.

[45] The focus is not on the intentions of reasonable parties, but rather on what the actual parties intended in the actual circumstances of the contract in issue: *Moulton Contracting Ltd. v. British Columbia*, 2015 BCCA 89 at para. 58. The introduction of an implied term relies on the shared intentions of both parties, not the subjective intentions of one or the other: *Kaban* at para. 88. Accordingly, the term a party seeks to have implied must have a degree of obviousness to it and may not be implied if there is evidence of a contrary intention on the part of either party: *M.J.B. Enterprises* at para. 29. The applicable principles were summarized in *Athwal*:

> [48] There is a presumption against adding an unexpressed term to a contract by implication unless: (i) it is necessary to do so in order to give the contract business efficacy (this does not include a test of reasonableness for the contract); (ii) to correct an obvious oversight for which there is "no dispute" that the parties intended to include such a term in the contract (i.e. the implied term "goes without saying"); (iii) the term can be clearly and precisely formulated; and (iv) the term will not conflict or be inconsistent with an express term of the contract. However, a term of a contract may only be implied where it is necessary to give legal effect to the parties' presumed intention, as expressed in the contract, and to give business efficacy to the contract. …The onus is on the party seeking to establish an implied term of a contract. See *Perin v. Shortreed Joint Venture Ltd.*, 2009 BCCA 478 at para. 27.

[46] Mr. Reyes provided some evidence regarding the Best Efforts Terms in his affidavit. Notably, he deposed that the Best Efforts Terms formed part of the Implied Umbrella Agreement, the assertion of which the defendants have since abandoned:

> 19. The Guarantee was executed as part of an overall oral agreement (the "Umbrella Agreement"), which was based on conversations with the Plaintiffs regarding the future approach to [Wild Goose]. The Oral terms were as follows:
>
> a. the Plaintiffs would not take steps to prevent [PortLiving Farms Limited Partnership] from being able to satisfy its obligations to the Plaintiffs pursuant to the [SPA];
>
> b. the Plaintiffs would not take steps to cause [Wild Goose] and/or the Business [Wild Goose Vineyards] to cease operating;
>
> c. the Plaintiff would not take steps to devalue the Partnership Units.

[47] Mr. Reyes' evidence that the parties had conversations that resulted in an oral agreement being reached on the Best Efforts Terms is fundamentally at odds with the defendants' position on this application that the Best Efforts Terms are implied terms of the SPA and the Guarantee. This is because an implied term is not, as a matter of legal concept, based on an agreement or understanding between the parties, but rather their shared intentions: *Kaban* at para. 101.

[48] As such, if I accept Mr. Reyes' evidence that the parties discussed and agreed to the Best Efforts Terms, then it cannot also be the case that those same terms need to be implied into the SPA and the Guarantee because the parties failed to turn their minds to them. It follows that there can be no finding that the parties

obviously would have agreed to them if they had turned their minds to them, because the parties already did so. The distinction is explained in *Kaban*:

> [101] In *The Interpretation of Contracts,* at 193-195, the author explains that an implied term is not, as a matter of legal concept, based on the agreement or understanding of the parties. Instead it is based on their shared intentions. There may be cases, as in this case, where the parties did discuss an issue or term that did not make its way into a contract. But that is not necessary. Indeed, in most cases that deal with implied terms the parties never turned their minds to the term that one of them subsequently seeks to imply into the contract. There is no "understanding" or "agreement" between them. The term is implied into the written agreement on account of business efficacy or because it is obvious what the parties would have said if they had been asked about the term when they entered into their agreement.
>
> [102] This point is developed in *The Interpretation of Contracts*, at 194, where the author refers to the following explanation in *Codelda Construction Pty Ltd. v. State Rail Authority of New South Wales,* (1982) 149 C.L.R. 337 at 346:
>
> > The implication of a term is to be compared, and at the same time contrasted, with rectification of a contract. In each case the problem is caused by a deficiency in the expression of the consensual agreement. A term which should have been included has been omitted. The difference is that with rectification the term which has been omitted and should have been included was actually agreed upon; with implication the term is one which the parties would have agreed had they turned their minds to it - it is not a term actually agreed upon. Thus, in the case of the implied term the deficiency in the expression of the consensual agreement is caused by the failure of the parties to direct their minds to a particular eventuality and to make explicit provisions for it. Rectification ensures that the contract gives effect to the parties' actual intentions; the implication of a term is designed to give effect to the parties presumed intention.
>
> [Emphasis added.]

[49] Thus, if, as Mr. Reyes deposed, the Best Efforts Terms were agreed to in conversations between the parties, they would form a separate oral agreement, not part of the SPA and the Guarantee by implication on the basis of business efficacy. In these circumstances, the proper plea would be for rectification, not implication.

[50] Regardless, even if this tension between the defendants' position and their own evidence could be overlooked, they have not established that the Best Efforts Terms were necessary to give business efficacy to the SPA or the Guarantee, or that the officious bystander test is met on the record before me. This is especially so given the multitude of contracts entered into between the parties in furtherance of

the sale of Wild Goose to the defendants. The only evidence in this respect are the bare assertions contained in Mr. Reyes' affidavit, which assertions are inconsistent with a claim for implication. Regardless, it is not at all obvious, given the multitude of written agreements entered into between the parties in furtherance of the sale of Wild Goose, that the Best Efforts Terms are necessary to give business efficacy to the SPA or the Guarantee. Nor is it obvious that the parties would have agreed to them if asked at the time those contracts were entered into.

[51] By way of example, the value of the Partnership Units as a component of the purchase price for Wild Goose is prescribed in the SPA as one dollar per unit for a total price of $1 million. I agree with the plaintiffs that in the circumstances, it would result in a commercial absurdity—the opposite of business efficacy—to imply additional terms into the SPA that would preclude the plaintiffs from taking steps to ensure they received payment of the agreed-upon purchase price.

[52] The necessity of implying the Best Efforts Terms—specifically a term that the plaintiffs would not "take steps to devalue" the Partnership Units—for business efficacy is also questionable as those terms are in this respect duplicative of the plaintiffs' covenants to act in Wild Goose's best interests in performing their obligations under the Employment Agreements. As Mr. Reyes confirmed, the plaintiffs' Employment Agreements were necessary and material terms of the SPA:

> 16. It was my understanding when I agreed to the [SPA], that Roland and Hagen were to be employed within [Wild Goose Vintners Inc.] and assisting with [Wild Goose Vineyards]. The Employment Agreements were necessary and material terms within the [SPA]. It ensured that the Plaintiffs would always operate in the best interest of [Wild Goose Vintners Inc.], act in good faith, and not devalue the Partnership Units.
>
> 17. The Employment Agreements provided the terms necessary to govern the conduct of the Plaintiffs and ensured that all parties operated with the mutual goal of successfully running the winery and fulfilling the obligations under the [SPA].
>
> [Emphasis added.]

[53] In my view, there is no need to imply a term that the plaintiffs would not take steps to devalue the Partnership Units by acting contrary to Wild Goose's interests into the SPA or the Guarantee on the basis of business efficacy when substantively

similar covenants are already contained in the Employment Agreements as set out in clauses 16 and 17 above. In this respect, I also note that the defendants confirmed in oral argument that they were not maintaining the position contained in the application response (but not pleaded in their response to civil claim) that the plaintiffs breached the Employment Agreements.

[54] Third, an implied term cannot be inconsistent with the express terms of a written agreement: *Kaban* at para. 80. Here, the defendants' position that the Best Efforts Terms are implied terms of the SPA and Guarantee is inconsistent with the entire agreement clauses contained in both the SPA and the Guarantee.

[55] As a starting point, the entire agreement clauses contained in the SPA and Guarantee constitute evidence of the plaintiffs' "contrary intention" as described in *M.J.B. Enterprises*. However, the language of an entire agreement clause will not necessarily be effective in preventing a party from relying on an implied term. In each case, the court considers the particular language used in the entire agreement clause to determine whether it captures the legal theory or position being advanced: *Kaban* at para. 99.

[56] Clause 9.7 of the SPA expressly precludes implied terms, providing that there are no "terms, … express or implied, or otherwise other than expressly set forth in this Agreement". The Guarantee is to the same effect as it likewise expressly precludes implied terms, stating that there are no "terms, express or implied, … affecting this Guarantee or the Guarantor's obligations and liabilities hereunder other than as expressed herein or in Section 5.5 of the Share Purchase Agreement". In my view, the language of the entire agreement clauses in the SPA and the Guarantee preclude this Court from implying the Best Efforts Terms into those agreements.

[57] Accordingly, in the present circumstances, I find that the entire agreement clauses in the SPA and Guarantee are a complete answer to the defendants' assertion of implied terms: *Bridal Falls Development Corp. v. Bridal Falls RV Park Inc*., 2023 BCSC 1496 at para. 26; see also *Water's Edge Resort Ltd. v. Canada (Attorney General)*, 2014 BCSC 873 at paras. 72–73. This is particularly the case as

entire agreement clauses are given more weight in circumstances, like here, where the parties are sophisticated and have access to legal advice, as was the case here: *Kaban* at para. 92.

[58] In the result, I conclude that the defendants have not met their onus of establishing that the Best Efforts Terms ought to be implied into either the SPA or the Guarantee on the basis of business efficacy.

(b) The Forbearance Agreement and resulting Receivership

[59] My conclusion that the Best Efforts Terms are not implied terms of the SPA or Guarantee is sufficient to dispose of this application and grant judgment in the plaintiffs' favour, particularly as the defendants advance no other defence. Nonetheless, even if I had determined that the Best Efforts Terms formed part of the SPA and the Guarantee by implication, the appointment of the Receiver would not have constituted a breach—let alone a fundamental breach—of those terms.

[60] First, in entering into the Forbearance Agreement, the defendants granted the GSA that resulted in, and consented to the appointment of, the Receiver. In exchange for the plaintiffs' forbearance regarding PortLiving Farms' default under the VTB Note, the plaintiffs obtained additional security over Wild Goose's assets, which security eventually gave rise to their right to have the Receiver appointed. Indeed, the Forbearance Agreement expressly required the plaintiffs to enforce their security by way of the Wild Goose GSA before seeking to realize on the mortgage security provided by the Parkview Guarantors.

[61] There is no dispute that the Forbearance Agreement is a commercial agreement negotiated by sophisticated parties who were represented by counsel. If the Best Efforts Terms were implied terms of the SPA and the Guarantee, one would have expected the defendants to have raised this issue when negotiating the Forbearance Agreement, refused to enter into it, or not agreed to clauses 6.15, 6.16 and 9.2 thereof. Instead, the defendants entered into the Forbearance Agreement, took the benefit of the plaintiffs' forbearance on the VTB Note, and provided the

plaintiffs with the additional security of the GSA that eventually led to the Receiver being appointed.

[62] When the defendants defaulted on their obligations under the Forbearance Agreement, the plaintiffs exercised their rights pursuant to the GSA and brought the Receivership proceedings. There is no indication that the defendants raised the Best Efforts Terms, took the position that the Receivership constituted a breach of those terms, or opposed the appointment of the Receiver.

[63] The terms of the Forbearance Agreement expressly contemplated the plaintiffs' right to have the Receiver appointed and this Court subsequently approved the Receiver's sale of Wild Goose's assets. The defendants have not articulated how, in these circumstances, the plaintiffs' conduct in exercising their rights under the Forbearance Agreement constitutes a fundamental breach of the Best Efforts Terms, even if those terms were implied into the SPA or the Guarantee.

(c) The Defendants Failed to Communicate Their Acceptance of the Alleged Repudiation

[64] Finally, repudiation will not effectively terminate a contract unless the innocent party accepts it and is prepared to treat the contract as ended: *Kaur v. Bajwa*, 2020 BCCA 310 at para. 26. The innocent party bears the onus of establishing that it has accepted a repudiation of a contract and communicated that acceptance to the repudiating party within a reasonable time: *Kaur,* at para. 29.

[65] The defendants have not established that they treated the appointment of the Receiver as a repudiation of the SPA or Guarantee, or communicated their acceptance thereof to the plaintiffs within a reasonable time. As noted above, the defendants did not take that position in the context of the Receivership and, even construed at its most generous, a "reasonable time" for them to do so has since passed.

[66] Further and in any event, the defendants adduced no evidence of having communicated their acceptance of the alleged repudiation to the plaintiffs.

Accordingly, even if the appointment of the Receiver could be construed as a fundamental breach of the Best Efforts Terms, assuming those terms were implied into the SPA and the Guarantee, the defendants have not met their onus of establishing that they accepted the plaintiffs' alleged repudiation and communicated that acceptance within a reasonable time, so as to bring the SPA or Guarantee to an end.

Conclusion

[67] The plaintiffs have established on a balance of probabilities that PortLiving Farms defaulted on its obligations under the SPA and that PortLiving Properties defaulted on its obligations under the Guarantee. The defendants have not established that the Best Efforts Terms were implied terms of the SPA or the Guarantee. Nor, in any event, would I have concluded that the appointment of the Receiver constituted a fundamental breach of those terms so as to relieve the defendants of their obligations under the SPA or the Guarantee.

[68] In the result, I find that PortLiving Farms is liable to the plaintiffs in the amount of $1 million pursuant to the SPA, and PortLiving Properties is liable to the plaintiffs in the amount of $1 million pursuant to the Guarantee. The plaintiffs are entitled to judgment in the amount of $1 million against the defendants on a joint and several basis.

[69] The plaintiffs also sought pre-judgment interest from March 21, 2023, the date the plaintiffs made their demand on the Guarantee. The Guarantee was payable on demand. The defendants have not articulated any reason why pre-judgment interest should not be awarded as sought. I therefore award pre-judgment interest from March 21, 2023, and post-judgment interest, both in accordance with the *Court Order Interest Act*, R.S.B.C. 1996, c. 79.

[70] The plaintiffs are entitled to their costs of this application and the action at Scale B.

"Hughes J."